

6-22-2021

## Cured: Proposing a Solution to the Hague Convention's "Zone of Disease" Defense

Savannah Mora

Follow this and additional works at: <https://chicagounbound.uchicago.edu/cjil>



Part of the [Law Commons](#)

---

### Recommended Citation

Mora, Savannah (2021) "Cured: Proposing a Solution to the Hague Convention's "Zone of Disease" Defense," *Chicago Journal of International Law*: Vol. 22: No. 1, Article 17.  
Available at: <https://chicagounbound.uchicago.edu/cjil/vol22/iss1/17>

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in Chicago Journal of International Law by an authorized editor of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# Cured: Proposing a Solution to the Hague Convention's “Zone of Disease” Defense

Savannah Mora\*

## Abstract

*Each year, thousands of children are taken from their homes to foreign countries by one of their parents (the “taking parent”) without the consent of their other parent (the “left-behind parent”). This phenomenon is frequently referred to as international child abduction. If both the country from which the child was taken and the country to which the child was taken are signatories to the Hague Convention, the left-behind parent can file a petition for return of the child under the treaty. Recently, in a number of courts around the world, taking parents facing Hague Convention litigation have argued that, because of the risks of international travel during the COVID-19 pandemic, their children should not be returned. These taking parents invoke Article 13(b) of the Convention, which provides a defense against a child’s return if there is “a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Taking parents contend that if children are obligated to travel internationally to satisfy return orders pursuant to the Convention, the children will be exposed to the virus and thus face a “grave risk” under Article 13(b).*

*This Comment argues that courts should adopt a rebuttable presumption against Article 13(b) defenses predicated on the risks of an infectious disease, or “zone of disease” defenses. This construction of the defense does not comport with existing precedent or the goals of the Hague Convention, and refusing to return abducted children on these grounds could lead to serious, long-term harm for the children. Instead, courts should only find a “grave risk” in cases where the child faces a particularized, demonstrable risk of serious complications incident to infection. This Comment encourages courts to fashion responsible and pragmatic protective measures to attach to Hague Convention return orders, ensuring both the safety and the prompt return of children who have been abducted.*

---

\* J.D. Candidate, 2022, The University of Chicago Law School. I would like to thank my family for their love, support, and encouragement. I would also like to thank the entire board and staff of the *Chicago Journal of International Law* for their valuable comments and extensive review, and Professor Erica Zunkel for her advisement.

## Table of Contents

I. INTRODUCTION .....	225
II. THE RETURN OF CHILD PETITION .....	229
A. The Purpose of the Hague Convention: Restoring the Status Quo .....	230
B. Factual Circumstances of Abduction .....	232
C. Procedural Matters & Central Authorities .....	234
D. Prima Facie Case and Defenses .....	237
III. ARTICLE 13(B): THE <i>FRIEDRICH</i> FRAMEWORK .....	238
IV. ALTERNATIVES TO THE IMMEDIATE RETURN OF THE CHILD .....	240
V. COVID-19'S IMPACT ON HAGUE CONVENTION CASES .....	243
A. Logistical Obstacles to the Administration of Proceedings .....	243
B. Guidance from the HCCH .....	244
C. Article 13(b) Issues .....	246
VI. ANALOGIZING INFECTIOUS DISEASE TO EXISTING PRECEDENT .....	249
A. The Illusive "Zone of Disease" .....	249
B. Zone of War .....	252
VII. SUGGESTIONS .....	254
A. The Rebuttable Presumption .....	254
B. The Unclean Hands Doctrine .....	257
VIII. CONCLUSION .....	259

## I. INTRODUCTION

In February 2020, the same month that the novel coronavirus (COVID-19) first appeared in Europe,<sup>1</sup> an eleven-year-old girl, PT, arrived in England with her mother.<sup>2</sup> PT, a “polite, calm, and confident girl,” was likely surprised to find herself in England.<sup>3</sup> She had lived in Spain her entire young life, and her mother had not told her that they were traveling to England.<sup>4</sup> Actually, PT’s mother had told her that they were moving to another town in Spain.<sup>5</sup> Instead, the mother and daughter arrived in England and immediately moved in with the mother’s new partner in the southeastern region of the country.<sup>6</sup> PT later reported that she was “a bit scared” of her mother’s new partner and that he shouted at her.<sup>7</sup>

Back in Spain, PT’s father, who shared parental responsibility of PT with PT’s mother under a judgement issued by the Spanish courts, alleged the child’s move to England took place without his knowledge or consent.<sup>8</sup> Initially, PT was told to lie to her father about their whereabouts.<sup>9</sup> When PT’s father did eventually learn that PT was living in England with her mother, he demanded that the child be returned to Spain.<sup>10</sup> PT’s mother refused, so the father traveled to England, hoping to retrieve PT.<sup>11</sup> The mother met the father at a shopping mall in England and allowed him to see PT, but she again refused to permit him to take the child back to Spain.<sup>12</sup>

Because the mother had unilaterally moved PT from Spain to England in breach of the father’s custody rights and without his consent or knowledge, the father had a strong case for international child abduction. On March 10, 2020, PT’s father filed a petition in the English courts for the child’s return to Spain<sup>13</sup> under the Hague Convention on the Civil Aspects of International Child

---

<sup>1</sup> Gianfranco Spiteri et al., *First Cases of Coronavirus Disease 2019 (COVID-10) in the WHO European Region*, 25(9) EUROSURVEILLANCE (2020), <https://perma.cc/GK3K-XKQU>. Please be advised that the COVID-19 pandemic is still ongoing at the time of writing and publication. Any characterizations and discussions of COVID-19 in this Comment reflect only the understanding and research of the author and should not be relied on for any medical or scientific purposes.

<sup>2</sup> KR v. HH [2020] EWHC (Fam) 834, [3] (Eng.).

<sup>3</sup> *Id.* at [31].

<sup>4</sup> *Id.* at [36], [31].

<sup>5</sup> *Id.* at [31].

<sup>6</sup> *Id.* at [6].

<sup>7</sup> *Id.* at [32].

<sup>8</sup> *Id.* at [37]–[38].

<sup>9</sup> *Id.* at [38].

<sup>10</sup> *Id.* at [7].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at [8].

Abduction (the Hague Convention or the Convention).<sup>14</sup> The Hague Convention provides a shared civil remedy among States Party—a return of child order—for left-behind parents in international child abduction cases.<sup>15</sup> The return of child remedy is available to left-behind parents who can establish a *prima facie* case under the Convention. Left-behind parents establish a *prima facie* case by demonstrating that their child was wrongfully removed or retained outside the child’s habitual residence and in violation of custody rights that the left-behind parent was actively exercising.<sup>16</sup> If the court finds that the left-behind parent has established a *prima facie* case, it must then determine whether any affirmative defenses apply that would permit the abductor to keep the child in the country that the child was abducted to.

After PT’s father filed a return of child petition in the English courts, a Children and Family Court Advisory and Support Service (CAFCASS) officer interviewed PT.<sup>17</sup> The social worker told England’s High Court, Family Division in London, that PT was “very angry with her mother for taking her to England against her wishes” and that the child’s emotional state was one of “desperation” at having been removed from Spain.<sup>18</sup> The judge noted that the social worker, “who is an extremely experienced CAFCASS Officer,” told him that that “this was only the second time in her long experience that she had encountered a child expressing such strong views in favour of return, despite remaining throughout in the care of their primary carer.”<sup>19</sup>

The High Court judge found that PT’s father had established a *prima facie* case for return and that PT had, in fact, been abducted from Spain by her mother.<sup>20</sup> In response, PT’s mother argued that the COVID-19 pandemic posed a “grave risk of harm” to PT and that, because traveling to Spain would put the child at risk of infection, PT should remain in England with her.<sup>21</sup> Thus, the judge was asked to consider one of the Hague Convention’s limited affirmative defenses. Under Article 13(b) of the Convention, a court is not bound to return a child if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>22</sup> A grave risk exists, *inter alia*, where the return of the child would put

---

<sup>14</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter The Hague Convention].

<sup>15</sup> *See id.*

<sup>16</sup> *Id.* art. 3.

<sup>17</sup> KR v. HH [2020] EWHC (Fam) 834, [10] (Eng.).

<sup>18</sup> *Id.* at [34].

<sup>19</sup> *Id.* at [33].

<sup>20</sup> *Id.* at [39].

<sup>21</sup> *Id.* at [46]–[47].

<sup>22</sup> The Hague Convention, *supra* note 14, art. 13.

him or her “in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease.”<sup>23</sup> In this case, PT’s mother argued that the child faced a heightened risk of infection by traveling during a pandemic and returning to Spain, where COVID-19 infections were high. In essence, the mother raised a “zone of disease” defense.

The High Court examined the mother’s “zone of disease” defense in two parts. First, the judge considered that, on the date the judgment was prepared, March 29, 2020, the pandemic was more advanced in Spain than in the England—the official death toll stood at 6,528 in Spain and 1,228 in England.<sup>24</sup> However, the judge also noted that the COVID-19 pandemic was a “serious public health emergency” in both countries and predicted that infection numbers would continue to rise in England and in Spain in the coming weeks.<sup>25</sup> Thus, he observed, “there is a genuine risk that PT could contract the virus whether she remains in England or returns to Spain.”<sup>26</sup> The High Court also noted that “those who are considered most at risk of serious complications from coronavirus are the elderly and those with underlying health conditions. Neither PT, nor her parents, fall within this category.”<sup>27</sup>

Second, the judge considered the increased risk of infection that PT would face by traveling internationally to return to her father in Spain. “I accept that international travel at this time potentially carries with it a higher prospect of infection than remaining in self-isolation,” wrote the judge.<sup>28</sup> “[T]he risk of infection posed by air travel, whilst no doubt significantly greater than normal, is not so high that either government [ ] felt [it] necessary to end flights altogether.”<sup>29</sup> Ultimately, the judge concluded that while flying from England to Spain during the pandemic would increase the child’s risk of contracting the virus, “such a risk, when considered in the context of the likely harm that would be suffered by PT should she contract the virus, [ ] sufficient to amount to the ‘grave risk’ of physical harm required by Art[icle] 13(b).”<sup>30</sup>

In light of this finding, the High Court ordered PT’s immediate return. The High Court noted that, because there was no guarantee that flights would continue to operate between England and Spain much longer, any delay in travel could

---

<sup>23</sup> Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996) (emphasis omitted).

<sup>24</sup> KR v. HH [2020] EWHC (Fam) 834, [46] (Eng.)

<sup>25</sup> *Id.* at [47].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

make the child's return to Spain "practically impossible" and leave her stranded in England with her abductor until the resolution of the pandemic.<sup>31</sup>

PT's case was among the first of its kind. It illustrates the challenges a court faces when navigating the uncharted territory of the "zone of disease" defense. From the beginning of the COVID-19 pandemic until January 2021, at least eight Hague Convention cases explicitly addressed the risks of infection in the context of the grave risk of harm defense.<sup>32</sup> Although the COVID-19 pandemic is an unprecedented public health crisis, it is not the last time judicial and administrative authorities will be asked to adjudicate Hague Convention cases against the backdrop of an infectious disease outbreak. The impact of COVID-19 on international child abduction litigation has exposed serious gaps in Article 13(b) caselaw and guidelines. To this author's knowledge, no legal scholarship has directly examined the "zone of disease" formulation of the grave risk of harm defense, even though it bears a resemblance to other well-established forms of the defense, like the zone of war formulation. Now that courts are beginning to observe defendants in Hague Convention cases harness the global pandemic for their benefit, it is crucial to develop a robust and operable framework for evaluating Article 13(b) defenses predicated on the risks of an infectious disease. This Comment is the first step in helping fill that void.

First and foremost, this Comment relies on the text of the Convention and on its accompanying explanatory report, which is instructive regarding the intentions of the Convention drafters. To flesh out provisions of the Convention, this Comment will often rely on interpretations put forward by U.S. courts, which provide a robust and coherent body of caselaw. This Comment will also discuss a number of foreign judgments that interpret the Convention, including several recent cases dealing with the "zone of disease" defense in the COVID-19 context.

Sections II and III discuss the Hague Convention's purpose, its exceptions, and the *prima facie* case for return under the Convention. The Convention rests upon a conviction that the best way to combat international child abduction is to refuse to grant it legal recognition. Thus, the treaty is designed to restore the legal status quo between the parties by returning the child to his or her habitual residence. Section IV explores alternatives to the immediate return of an abducted child and discusses the potential long-term consequences for a child if a "zone of

---

<sup>31</sup> *Id.* at [50].

<sup>32</sup> *See, e.g., id.*; FamC (MC TA) 52595-02-20 *The Father v. The Mother* (2020) (Isr.), <https://perma.cc/E8NN-HEZS>; C v. G [2020] IECA 233 (Ir.); *Re N (a child)* [2020] EWFC 35 (Eng.); *Chambers v. Russell*, No. 1:20CV498, 2020 WL 5044036, at \*14 (M.D.N.C. Aug. 26, 2020); Thüringer Oberlandesgericht [OLGZ] [Higher Regional Court of Thuringia] Mar. 17, 2020, 1 UF 11/20 (Ger.); Oberlandesgericht Karlsruhe [OLGZ] [Higher Regional Court of Karlsruhe] June 25, 2020, 2 UF 200/19 (Ger.) <https://perma.cc/ZU2P-Z5KG>; Amtsgericht Hamm Familiengericht Beschluss [Hamm Local Court], Apr. 23, 2020, 32 F 14/20, (Ger.) <https://perma.cc/9EQ6-5SS9>.

disease” defense is successful. Section V explains COVID-19’s impact on Hague Convention cases. Section VI analogizes the risks of infectious diseases to existing categories of risk found in Article 13(b) caselaw in order to evaluate the viability of “zone of disease” defenses under current precedent. Section VII proposes a framework for evaluating grave risk of harm defenses predicated on the risks of an infectious disease.

This Comment’s proposal upholds the goals of the Hague Convention in restoring the legal status quo between parties and disincentivizing forum shopping by securing the prompt and safe return of the child. Ultimately, this Comment concludes that, absent a showing of particularized risk to the child, courts should reject grave risk of harm defenses where the underlying risk alleged is exposure to an infectious disease. Judicial and administrative authorities charged with adjudicating the Hague Convention are empowered to exercise judicial discretion and to fashion protective measures, often referred to as undertakings, to ensure that a child’s return is safe. This Comment recommends that in lieu of granting grave risk of harm exceptions—which would flatly deny left-behind parents’ petitions for return—courts should exercise their powers to deliver common-sense solutions to the logistical and safety obstacles posed by infectious diseases.

## II. THE RETURN OF CHILD PETITION

Each year, thousands of children are taken from their homes to foreign countries by one of their parents (the “taking parent”) without the consent of their other parent (the “left-behind parent”).<sup>33</sup> This phenomenon is frequently referred to as international child abduction. If both the country that the child was taken from (the child’s “habitual residence”) and the country the child was taken to (“the State of refuge”) are signatories to the Hague Convention, the left-behind parent can file a petition for return of the child under the treaty.<sup>34</sup> As long as the child is under sixteen years old, the Convention allows the left-behind parent to civilly enforce the child’s return from one State Party to another.<sup>35</sup> A decision under the Convention does not purport to resolve the underlying custody issues on their merits; a return of child order simply seeks to restore the parties’ legal and geographical status quos.<sup>36</sup>

To enforce the child’s return, the left-behind parent must establish a *prima facie* case for return of the child. A successful *prima facie* case under the Convention creates a presumption that the child should be returned and

---

<sup>33</sup> For a statistical analysis of applications made in 2015 under the Hague Convention, see HAGUE CONF. ON PRIV. INT’L L., GLOB. REP. 3 (2018), <https://perma.cc/HA27-L9DV>.

<sup>34</sup> The Hague Convention, *supra* note 14, art. 13.

<sup>35</sup> *Id.* art. 4.

<sup>36</sup> *Id.* art. 19.



establishes that the taking parent is, in fact, an abductor. Then, the abductor has the opportunity to raise one or more defenses opposing return. The United States and over 100 other countries<sup>37</sup> have ratified the Hague Convention, which is “the most important international treaty on the subject of international child abduction and probably in all of international family law.”<sup>38</sup> This Section examines the purpose of the Hague Convention, the factual circumstances of international child abduction, the procedural obligations of States Party, and the *prima facie* case for return of a child under the Convention.

#### A. The Purpose of the Hague Convention: Restoring the Status Quo

The Convention provides a civil remedy—a return of child order—to left-behind parents who demonstrate that their custody rights may have been violated by their child’s “wrongful[ ] remov[al] or ret[ention]” outside the child’s country of “habitual residence.”<sup>39</sup> The left-behind parent, with the assistance of his or her government’s foreign service department, brings suit against the taking parent in the State of refuge. If the left-behind parent is successful in obtaining a return of child order, this order does not necessitate the left-behind parent will gain custody; it only assures that the child will be returned to his or her country of habitual residence.<sup>40</sup>

The Convention serves a crucial procedural and administrative role in combating international child abduction and includes important “safety valves” like Article 13(b) to protect the wellbeing and wishes of the child. However, the goal of the Hague Convention is easily misunderstood given “the drama implicit in the fact that it is concerned with the protection of children in international relations.”<sup>41</sup> Accordingly, it may surprise some to learn that cases litigated under the Convention do not decide the merits of the underlying custody dispute.<sup>42</sup> “[T]he Convention’s stated object . . . is to secure the prompt return of children who have been wrongfully removed or retained.”<sup>43</sup> By securing the prompt return of the child but declining to reach the underlying custody dispute, the Convention

---

<sup>37</sup> Ratifying nations include: the U.S., Brazil, Hong Kong and Macau, Australia, Canada, Iraq, Japan, France, Italy, South Korea, Mexico, the U.K., South Africa, Morocco, Russia, and Thailand. Notable exclusions include: China, India, the Philippines, Iran, and Vietnam. *Status Table: 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIV. INT’L L., <https://perma.cc/3E7T-N6EQ>.

<sup>38</sup> JEREMY D. MORLEY, *INTERNATIONAL FAMILY LAW PRACTICE* § 9:1 (updated July 2020).

<sup>39</sup> The Hague Convention, *supra* note 14, arts. 1, 3.

<sup>40</sup> *Id.* art. 19.

<sup>41</sup> *Rinau v. Lithuania*, App. No. 10926/09, ¶ 15 (Dec. 3, 2019), <https://perma.cc/92MX-UHR9>.

<sup>42</sup> The Hague Convention, *supra* note 14, at art. 19.

<sup>43</sup> Elisa Pérez-Vera, *Explanatory Report: Hague Convention on Private International Law*, in *ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION* 426, 431 (1982) <https://perma.cc/T5X5-U2VL> [hereinafter *The Pérez-Vera Report*].

combats and deters the practice of international child abduction by neutralizing the potential benefits of forum shopping.<sup>44</sup>

International child abduction creates unfair legal *and* logistical advantages for the abductor. It is these artificially-created advantages that often lead parents to abduct their children internationally in the first place.<sup>45</sup> First, abductors use international child abduction to impermissibly forum shop for favorable custody laws in other countries.<sup>46</sup> A parent may abduct a child to a country with more favorable custody laws intending to exploit those laws to the left-behind parent's disadvantage.<sup>47</sup> Alternatively, the taking parent may seek an opportunity to relitigate—or simply escape—a custody judgment that was decided unfavorably against them in the child's habitual residence.<sup>48</sup> Even if the custody consequences of abduction are secondary in the taking parent's mind to his or her primary motivation for removing the child, the taking parent will still stand to benefit from "the consolidation through lapse of time of the situation brought about by the removal of the child."<sup>49</sup> Second, by abducting a child internationally, the taking parent erects a sizeable logistical and financial hurdle for the left-behind parent who must pursue cross-border litigation to retrieve his or her abducted child.<sup>50</sup>

Recognizing the unfair legal and logistical advantages international child abduction confers on taking parents, the Hague Convention's official explanatory report, the Pérez-Vera Report, firmly states that "the Convention as a whole rests upon . . . the conviction that *the best way to combat [illegal child removals] at an international level is to refuse to grant them legal recognition.*"<sup>51</sup> Because the Convention drafters saw forum shopping as a loophole that incentivized and enabled international child abduction, they placed considerable weight on the "restoration of the status quo" via the "prompt return" of the abducted child.<sup>52</sup> Once the child is returned to his or her habitual residence, the parents are to litigate any outstanding custody disputes according the laws of that country, which is "in principle best placed to decide upon questions of custody and access."<sup>53</sup>

---

<sup>44</sup> *Id.* at 429.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See generally id.*

<sup>48</sup> *See generally id.*

<sup>49</sup> *Id.* at 429.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 434 (emphasis added).

<sup>52</sup> *Id.* (quoting The Hague Convention, *supra* note 14, art. 1).

<sup>53</sup> The Hague Convention, *supra* note 14, art. 19; the Pérez-Vera Report, *supra* note 43, at 434–435.

## B. Factual Circumstances of Abduction

The circumstances of international child abduction vary considerably. Sometimes, the taking parent ostensibly takes the child on vacation but never returns. In a prototypical case handled by the State Department in 2004, a mother took her child to Rio de Janeiro for a vacation; the father planned to join them there later.<sup>54</sup> Three days after arriving in Rio, the mother initiated divorce proceedings in Brazil and demanded that the father travel to Brazil to sign papers ceding full custody of their child to her.<sup>55</sup>

In other cases, the taking parent disappears with the child unexpectedly, and the left-behind parent has no indication of where they have gone—or if the child has even left the country. A recent case heard in the U.K.’s Family Division of the High Court is illustrative of this type of “ghosting.” In *AX v. CY*,<sup>56</sup> the father and mother, who both lived in Spain, had what appeared to be an amiable custody agreement, which had been incorporated into a written document in March 2018 with the assistance of lawyers.<sup>57</sup> There was no indication to the father that there were any issues with the agreement, so “it came as a considerable surprise to him, and no doubt great dismay as well,” to learn that neither the mother nor the child were living in their home in Barcelona and that the child was no longer attending her school.<sup>58</sup> In December 2018, the mother sent the father a picture of the child in London, and the father learned the potential whereabouts of his daughter for the first time.<sup>59</sup> The father provided the court with telephone transcripts in which the mother told him that there was nothing he could do:

Do you think you’re going to win by searching the whole world or what[?] . . . [A]nd when you come to look for your daughter, wherever you think she is, look, come with a lot of money in your pocket . . . [Y]ou won’t have anywhere to look to find me . . . Nobody knows where I live.<sup>60</sup>

Sometimes, taking parents flee with children after an unfavorable custody decision is handed down by the child’s habitual residence.<sup>61</sup> Unlike “ghosting,” which intentionally catches the left-behind parent off guard, this type of abduction may be responsive to preventative measures advocated for by the Permanent

---

<sup>54</sup> U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL ABDUCTION 26 (2010), <https://perma.cc/7XV8-MV5Y> [hereinafter STATE DEP’T, REPORT ON COMPLIANCE].

<sup>55</sup> *Id.*

<sup>56</sup> [2020] EWHC (Fam) 1599 (UK).

<sup>57</sup> *Id.* at [7]–[8].

<sup>58</sup> *Id.* at [8].

<sup>59</sup> *Id.* at [10].

<sup>60</sup> *Id.*

<sup>61</sup> See STATE DEP’T, REPORT ON COMPLIANCE, *supra* note 54, at 30.

Bureau of the Hague Conference on Private International Law (HCCH).<sup>62</sup> Preventative measures are proactive steps taken by the government to intervene in a hostile custody situation before an abduction takes place.<sup>63</sup>

In contrast, some taking parents may be fleeing an abusive relationship. The issue of domestic violence generally, and specifically instances where victims of domestic violence employ international child abduction to escape the abuse of themselves and their families, has recently become more visible in the public consciousness.<sup>64</sup> One particularly harrowing case, *Van De Sande v. Van De Sande*,<sup>65</sup> describes escalating physical and verbal abuse directed by the father, Davy, at the mother, Jennifer, and their children.<sup>66</sup> Jennifer and the children finally escaped their abuser in 2004, during a visit to Jennifer's parents in the U.S., when Jennifer told Davy that she and the children would not return to Belgium.<sup>67</sup> Davy "threatened to kill the children. He had earlier threatened to kill Jennifer. And the next day, in a conversation with Jennifer's brother, he threatened to kill 'everybody.'"<sup>68</sup> Eventually, Jennifer informed her father about Davy's threats.<sup>69</sup> Jennifer's father called law enforcement and a police officer escorted Davy from the house.<sup>70</sup> Later, the court found that Davy's abuse amounted to a grave risk of harm under Article 13(b) and accordingly denied his petition for return of the children to Belgium.<sup>71</sup> There are a number of legal scholars whose work sheds light on this intersection between domestic violence and international child abduction.<sup>72</sup> As *Van De Sande* illustrates, Article 13(b) acts as an important safeguard in this context.

---

<sup>62</sup> See generally HAGUE CONF. ON PRIV. INT'L L., Part III—Preventative Measures, in GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2005) <https://perma.cc/3M9E-GKNQ>.

<sup>63</sup> See generally *id.*

<sup>64</sup> See, e.g., Brian Quillen, *The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction*, 49 TEX. INT'L L.J. 621 (2014).

<sup>65</sup> 431 F.3d 567 (7th Cir. 2005).

<sup>66</sup> *Id.* at 529, 569–70.

<sup>67</sup> *Id.* at 569.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 570.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 572.

<sup>72</sup> See, e.g., Kyle Simpson, *What Constitutes A "Grave Risk of Harm?": Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 GEO. MASON L. REV. 841, 846 (2017); Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*, 47 FAM. L.Q. 299, 300 (2013); Karen Brown Williams, *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases*, 4 J.

### C. Procedural Matters & Central Authorities

While the circumstances of the abduction—and the culpability of the parties—are case-specific, the procedural path for filing a Hague Convention case is standardized across States Party.<sup>73</sup> Under Article 6 of the Convention, each country that has ratified or acceded to the Convention is required to have a Central Authority (in the U.S., the State Department), which is the main point of contact for parents and other governments involved in abduction cases.<sup>74</sup> Once the left-behind parent realizes that the child is missing, he or she will inform the Central Authority in his or her country that an abduction has occurred. The Central Authority works with the left-behind parent to complete an application, required under Article 8 of the Convention, in order to initiate the process.<sup>75</sup> Then, the Central Authority forwards the completed application to the corresponding Central Authority in the State of refuge and monitors the case throughout the foreign administrative and legal processes.<sup>76</sup> Documents submitted as part of a Hague Convention application to the Central Authority are “admissible in courts in partner countries without the formalities often required by courts for admitting documents from foreign countries.”<sup>77</sup>

Cooperation between Central Authorities is a cornerstone of the Convention and absolutely essential to the Convention’s efficacy in addressing the scourge of international child abductions. Article 7 of the Convention requires Central Authorities “to secure the prompt return of children” “either directly or through an intermediary” and to “take all appropriate measures”:

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

---

MARSHALL L. J. 39, 41–42 (2011); Noah L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L.J. 1193, 1194 (2011); see also Quillen, *supra* note 64, at 622; Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49, 51 (2008)

<sup>73</sup> NAT’L CTR. FOR MISSING & EXPLOITED CHILD., LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 3 (2012) <https://perma.cc/PND3-AFQQ> [hereinafter NCMEC, HAGUE CONVENTION MANUAL].

<sup>74</sup> The Hague Convention, *supra* note 14, art. 6.

<sup>75</sup> *Id.* arts. 6, 8.

<sup>76</sup> *Id.* art. 9.

<sup>77</sup> *Important Features of the Hague Abduction Convention—Why the Hague Convention Matters*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <https://perma.cc/7ZHB-2UU7>.

- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.<sup>78</sup>

As discussed later in Sections V, VI, and VII, in the infectious disease context, the Central Authorities' duty to secure the "prompt return of children" may be in tension with their obligation to do so "[safe]ly."<sup>79</sup>

If the child is abducted to the U.S., for example, the State Department (the U.S.'s Central Authority) will begin the process of locating the child after receiving from the Central Authority of the child's habitual residence a completed application filed by the left-behind parent.<sup>80</sup> The State Department partners with other governmental and non-governmental agencies, including the International Social Service, the Federal Bureau of Investigation, the International Criminal Police Organization (INTERPOL), individual states' missing-child clearinghouses, and the National Center for Missing and Exploited Children (NCMEC), to locate the child "using school, employment, financial, social security, police, postal, internet or other public records."<sup>81</sup> The investigative process may be particularly arduous if the taking parent has transitory living accommodations, difficulty enrolling the child in school, illegal immigration status, or a fear of detection by law enforcement.<sup>82</sup>

Once the child is located, the U.S. State Department will try to negotiate with the taking parent to voluntarily return the child.<sup>83</sup> If those efforts are unsuccessful, the State Department will attempt to secure an affordable or *pro bono* attorney for the left-behind parent by sending outreach letters to attorneys who

---

<sup>78</sup> The Hague Convention, *supra* note 14, art. 7.

<sup>79</sup> *Id.*

<sup>80</sup> NCMEC, HAGUE CONVENTION MANUAL, *supra* note 73, at 3.

<sup>81</sup> *Id.* at 92.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 93.

have agreed to consider representation.<sup>84</sup> Once the left-behind parent has retained an attorney, that attorney will aid the left-behind parent in filing a Hague petition for the return of the child in the appropriate court. Impediments to smooth litigation may include language barriers to effective attorney-client communication and financial barriers that prevent the left-behind parent from traveling to the State of refuge for hearings.<sup>85</sup>

Not all U.S. courts are equally prepared to handle Hague Convention cases, which are “unusual” under the most straightforward circumstances.<sup>86</sup> To alleviate confusion, the State Department will send a letter to the judge presiding over the case that “explains the State Department’s role as U.S. Central Authority for the Hague Convention and refers to key provisions of the Hague Petition and documents regarding the history of the Hague Convention (*i.e.*, the Pérez-Vera Report).”<sup>87</sup> The State Department will also provide the judge with a list of other judges in the same (or nearby) jurisdiction(s) who may be able to provide their own experience as a guide.<sup>88</sup>

The State Department’s Hague Convention procedures are an example of how one Central Authority—albeit one in a demonstrably compliant State Party<sup>89</sup>—has decided to fulfill its requirements under Article 7. But this illustration also demonstrates how, even in compliant countries and under the best of circumstances, international child abduction cases are far from smooth sailing for the left-behind parent. In countries that have a demonstrated pattern of noncompliance with the Convention, judicial authorities fail to implement and comply with the provisions of the Convention and authorities fail to take appropriate steps to locate children or enforce return orders, leaving petitions unresolved—sometimes for years.<sup>90</sup> Thus, although the Hague Convention, and the cross-border cooperation the Convention mandates, has undoubtedly eased the otherwise-unmanageable burden on left-behind parents attempting to retrieve their abducted children, these cases remain extremely burdensome for the left-behind parent. This holds true even in complaint countries—but especially in those countries exhibiting a pattern of noncompliance.

---

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 94–95.

<sup>86</sup> *Id.* at 98.

<sup>87</sup> *Id.* at 99.

<sup>88</sup> *Id.*

<sup>89</sup> U.S. STATE DEP’T, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 8 (2020) <https://perma.cc/3W7C-HV5C>.

<sup>90</sup> Each year the U.S. State Department issues an annual report on compliance with the Hague Convention. In 2020, Argentina, Brazil, Costa Rica, Ecuador, Egypt, India, Jordan, Peru, Romania and the U.A.E. were all flagged as States Party demonstrating a pattern of noncompliance. *Id.*

## D. Prima Facie Case and Defenses

Article 3 of the Hague Convention provides that:

The removal or the retention of a child is to be considered wrongful where –

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.<sup>91</sup>

It is typical for courts in the U.S. and in other States Party to condense and reframe these Article 3 elements into a threshold determination of habitual residence, followed by a two-step inquiry to determine whether the removal or retention was “wrongful.”<sup>92</sup> Consider the U.S. Supreme Court’s articulation of the prima facie case for wrongful removal under the Convention: the left-behind parent must establish by a preponderance of the evidence<sup>93</sup> that (1) the child was habitually resident in a foreign country immediately before his or her removal to or retention in the U.S., (2) the removal or retention is in breach of the petitioner’s custody rights under the law of the foreign country, and (3) the petitioner was exercising his or her custody rights at the time of removal or retention.<sup>94</sup>

There are five potential defenses<sup>95</sup> to a prima facie case of wrongful removal or retention, which, according to the Pérez-Vera Report, must be strictly construed—“applied only as far as they go and no further”—to prevent the Convention from becoming a “dead letter.”<sup>96</sup> These defenses include: the “age and maturity” exception (Article 13), the consent exception (Article 13(a)), the “now-settled” exception (Article 12), the human rights exception (Article 20), and the “grave risk of harm” exception (Article 13(b)).<sup>97</sup> The most common of these defenses is the Article 13(b) grave risk exception,<sup>98</sup> which is the subject of this Comment.

---

<sup>91</sup> The Hague Convention, *supra* note 14, art. 3.

<sup>92</sup> The Pérez-Vera Report, *supra* note 43, at 444.

<sup>93</sup> International Child Abduction Remedies Act, 22 U.S.C. § 9003(e)(1) (implementing the Hague Convention in the U.S.).

<sup>94</sup> *See, e.g.,* Chafin v. Chafin, 568 U.S. 165, 168 (2013).

<sup>95</sup> MELISSA L. BREGER ET AL., *New York Law of Domestic Violence* § 4.6 (3d ed. 2020).

<sup>96</sup> The Pérez-Vera Report, *supra* note 43, at 434.

<sup>97</sup> The Hague Convention, *supra* note 14, arts. 12, 13 & 20.

<sup>98</sup> Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 676 (2001).



### III. ARTICLE 13(B): THE *FRIEDRICH* FRAMEWORK

Article 13(b) of the Hague Convention states that

the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>99</sup>

*Friedrich v. Friedrich* is the preeminent case on the Article 13(b) grave risk defense. Not only does it define the grave risk exception for U.S. courts, it is also frequently cited in Hague Convention decisions abroad.<sup>100</sup> In *Friedrich*, the Sixth Circuit held that an Article 13(b) grave risk exists in two circumstances. The first is where “there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease.”<sup>101</sup> The second is “in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”<sup>102</sup> As previously noted, in conducting an Article 13(b) analysis, “courts cannot consider information that would be proper in a plenary custody hearing, engage in a custody determination, or address who would be the better parent” because judges adjudicating Hague Convention cases are not authorized to pass judgment on the underlying custody dispute.<sup>103</sup>

Historically, American courts have construed the Article 13(b) defense narrowly, rarely finding a grave risk of harm to the child. This approach aligns with the drafters’ intention that all of the Convention’s defenses “be interpreted in a restrictive fashion.”<sup>104</sup> Applying the *Friedrich* framework, “U.S. courts have held that the defense is not satisfied in cases [where, upon return, the child will face] poverty, unfavorable living conditions, or limited educational opportunities.”<sup>105</sup> Additionally, pursuant to the Convention’s objective of deterring forum shopping by abductors, U.S. courts have found arguments predicated on psychological harm created by the child’s future separation from their abductor unconvincing, holding that “[t]he harm to the child must be greater

---

<sup>99</sup> The Hague Convention, *supra* note 14, art. 13.

<sup>100</sup> See, e.g., C v. G [2020] IECA 223 (Ir.).

<sup>101</sup> *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (emphasis omitted).

<sup>102</sup> *Id.*

<sup>103</sup> Lauren Cleary, *Disaggregating the Two Prongs of Article 13(b) of the Hague Convention to Cover Unsafe and Unstable Situations*, 88 FORDHAM L. REV. 2619, 2632 (2020).

<sup>104</sup> The Pérez-Vera Report, *supra* note 43, at 434.

<sup>105</sup> Cleary, *supra* note 103, at 2633.

than what is normally to be expected when a child is taken away from one parent and passed to another parent.”<sup>106</sup>

Foreign courts differ from those in the U.S. and each other in their treatment of the grave risk of harm exception in many of the exception’s applications. For example, the treatment of grave risk of harm defenses concerning allegations of domestic violence tends to vary considerably between courts.<sup>107</sup> In contrast, the treatment of Article 13(b) exceptions predicated on “the unsuitability of conditions in the child’s habitual residence writ large” is relatively uniform internationally.<sup>108</sup> That is because *Friedrich* is “well-known” throughout the global judiciary, and many courts employ it as a guide when adjudicating this type of defense, leading to more consistent results.<sup>109</sup> In most countries, however, there is a dearth of cases dealing with a grave risk of harm defense predicated on conditions in the child’s habitual residence. In the courts that have seen this construction of the exception raised, it has been “raised most frequently with regard to Israel.”<sup>110</sup> The vast majority of courts concluded that the war-zone conditions in Israel did not constitute a grave risk of harm to the child.<sup>111</sup> An Argentinian court of first instance reasoned that “[u]nfortunately, acts of terrorism due to political, racial and religious intolerance occur all over the world. As the Prosecutor for Minors points out in his judgment . . . in the city of Buenos Aires, where [the child currently lives], terrorist acts were perpetrated . . . which . . . caused outrage around the world.”<sup>112</sup> The court’s judgment rests on the distinction between a particularized risk and a general, or universal, one.

Because Article 13(b) is so often litigated and so often fraught with confusion relative to the Convention’s other defenses, it is the only Convention defense about which the Permanent Bureau of the Hague Conference on Private International Law (HCCH) has seen necessary to publish a guide. The HCCH’s Guide to Good Practice (the Guide) provides guidance on the operation of Article 13(b) defenses under the Hague Convention to all States Party.<sup>113</sup> The Guide to

---

<sup>106</sup> *Id.* at 2634.

<sup>107</sup> Peter McEleavy, *Case Law Analysis: Risks Associated with the Child’s State of Habitual Residence*, HAGUE CONF. ON PRIV. INT’L L.: INT’L CHILD ABDUCTION DATABASE (INCADAT) (April 2013) <https://perma.cc/9JRU-E68Y> [hereinafter McEleavy, *Habitual Residence Case Law Analysis*].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Buenos Aires Court of First Instance, 05/10/2001, “A v. A.” (2001) (Arg), <https://perma.cc/GAY7-3EMF>.

<sup>113</sup> HAGUE CONF. ON PRIV. INT’L L., *Part V—Article 13(1)(b), in [DRAFT] GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION* (2019), <https://perma.cc/TJ6N-QGZ7> [hereinafter HCCH, ARTICLE 13(B) GUIDE].

Good Practice outlines three types of “grave risk.”<sup>114</sup> These types of risk are: a grave risk that the return would expose the child to physical harm, a grave risk that the return would expose the child to psychological harm, and a grave risk that the return would otherwise place the child in an intolerable situation. The Guide explains that these three types of risk must be (1) evaluated for the gravity of the risk and (2) assessed through a “forward-looking” lens.<sup>115</sup> First, the level of risk must be “grave”—“the risk must be real and reach such a level of seriousness to be characterized as ‘grave.’”<sup>116</sup> The Guide explains that the Convention drafters replaced “substantial risk” with “grave risk” because “‘grave’ was considered a more intensive qualifier.”<sup>117</sup> Second, the exception should focus on the situation the child will face once returned.<sup>118</sup> Although past experiences in their country of habitual residence may bear on this analysis, courts should be sure to factor in any changes that may have taken place since the child was last in the country that may affect his or her future experiences.<sup>119</sup>

There is some evidence that the Guide has proven a useful resource for courts struggling with conflicting interpretations of Article 13(b). In 2011, the United Kingdom Supreme Court clarified the scope of the Article 13(b) defense in its seminal case *Re E (Children)*. The decision echoed a number of the principles set forth in the Guide and added that “[t]here is no need for Art[icle] 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art[icle] 13 are quite plain and need no further elaboration or gloss.”<sup>120</sup>

#### IV. ALTERNATIVES TO THE IMMEDIATE RETURN OF THE CHILD

If a court finds that the abductor has failed to establish a grave risk of harm defense, the child must be returned to his or her country of habitual residence. However, the judge is empowered to temporarily stay the return order. This option is useful in the context of infectious disease outbreaks—the court can reject the Article 13(b) exception but keep the child in the State of refuge until it is safe for him or her to travel.<sup>121</sup>

---

<sup>114</sup> *Id.* at 15.

<sup>115</sup> *Id.* at 15–16.

<sup>116</sup> *Id.* at 15.

<sup>117</sup> *Id.* at 15 n.49.

<sup>118</sup> *Id.* at 16.

<sup>119</sup> *Id.*

<sup>120</sup> *BK v. NK* [2016] EWHC (Fam) 2496, [45] (explaining the holding in *Re E (Children)* (Abduction: Custody Appeal) [2011] 2 FLR 758), <https://perma.cc/B9XL-FTSX>.

<sup>121</sup> *See, e.g., Gallegos v. Garcia Soto*, No. 1:20-CV-92-RP, 2020 WL 2086554, at \*8 (W.D. Tex. Apr. 30, 2020) (“However, IT IS FURTHER ORDERED that the effective date of this Order is stayed, indefinitely, until such time as the Court and the parties can be reasonably confident that the

If a court finds that the abductor has successfully established a grave risk of harm defense, the judge is faced with a decision. Article 13(b) provides that even if the court does find that the exception applies, the judge still has the ability to exercise his or her discretion to return the child notwithstanding the fact that the abductor has met his or her burden to show a grave risk of harm.<sup>122</sup> A judge in the High Court of the Hong Kong Special Administrative Region Court of Appeal explained under what circumstances judges should exercise their discretion:

It may be that *highly unusual* or *exceptional* circumstances might justify the exercise of the discretion to return the child notwithstanding the grave risk shown to exist although it is difficult to conceive of such situations. Even so, this could not and should not be done without the judge being fully satisfied that adequate and sufficient practical measures are in place to ensure that the child would not be exposed to any risk of harm.<sup>123</sup>

In some States Party, courts are required to exercise their judicial discretion by considering protective measures that would, notwithstanding a grave risk of harm, allow the child to be returned to his or her habitual residence. Some U.S. courts are also required to consider such measures. The Second, Third, Sixth, Seventh, and Ninth Circuits have all held that before denying return based on the grave risk of harm exception, courts should consider protective measures that would allow the child's return while still providing for the child's protection.<sup>124</sup>

In most countries, protective measures take the form of voluntary undertakings, which are promises made by the left-behind parent to the court to do (or not do) certain things in conjuncture with the child's return order. According to the Guide,

[a]n undertaking is a voluntary promise, commitment or assurance given by a natural person – in general, the left-behind parent – to a court to do, or not to do, certain things. Courts in certain jurisdictions will accept, or even require, undertakings from the left-behind parent in relation to the return of a child. An undertaking formally given to a court in the requested jurisdiction in the context of return proceedings may or may not be enforceable in the State to which the child will be returned.<sup>125</sup>

---

COVID-19 pandemic no longer renders international travel unsafe and widespread social distancing practices are no longer necessary . . . The Court will schedule status conferences as necessary to determine the precise date and the logistics of Y.E.G.'s return, involving the Mexican Consulate when appropriate and keeping in mind the need to ensure Y.E.G.'s return is both 'prompt' and 'safe.'").

<sup>122</sup> The Hague Convention, *supra* note 14, art. 13.

<sup>123</sup> D. v. G. [2001] 1179 H.K.C. 1, 5 (C.F.A.) (H.K.), <https://perma.cc/QSH8-DPB2> (emphasis added).

<sup>124</sup> See generally Tracy Bateman Farrell, Annotation, *Construction and Application of Grave Risk of Harm Exception in Hague Convention on the Civil Aspects of International Child Abduction as Implemented in International Child Abduction Remedies Act*, 42 U.S.C.A. § 11603(e)(2)(A), 56 A.L.R. Fed. 2d 163 (2011).

<sup>125</sup> HCCH, ARTICLE 13(B) GUIDE, *supra* note 113, at 8.

The Guide adds that such voluntary undertakings are not easily enforceable and therefore “should be used with caution, especially in cases [where the grave risk involves] domestic violence.”<sup>126</sup> The court may also be able to give legal effect to a protective measure via a mirror order in the state of habitual residence if possible and available.<sup>127</sup> However, the court “cannot make orders that would exceed its jurisdiction or that are not required to mitigate an established grave risk.”<sup>128</sup>

If a “grave risk” *is* found—and if the judge declines to exercise his or her discretion to return the child notwithstanding the successfully mounted defense—the consequences for the abducted child are fairly permanent: the left-behind parent’s petition will be denied, and the court will order the child to remain in the physical custody of the abductor. The left-behind parent can appeal the decision according the civil procedure rules of the court. After the left-behind parent exhausts the appeals process, however, the child’s custody status can only change if other forms of adjudication intercede—if, for example, a family court resolved the underlying custody dispute in a way that is averse to the abductor. The odds, however, of a favorable custody outcome for the left-behind parent in this situation are miserably low. The Pérez-Vera Report, explains why:

It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims. . . . In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision . . . will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to 'legalize' a factual situation which none of the legal systems involved wished to see brought about.<sup>129</sup>

As discussed in Section II(A), the Hague Convention’s *raison d'être* is to ensure that the left-behind parent does not face the forum and logistical disadvantages inherent in being forced to litigate the underlying custody dispute in a foreign country chosen by the abductor. If the left-behind parent’s petition is denied because of a successful grave risk of harm defense, the left-behind parent, after exhausting the appeals process, is essentially left to fend for his or herself. When a left-behind parent emerges from the Hague Convention process empty-

---

<sup>126</sup> *Id.* at 21.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> The Pérez-Vera Report, *supra* note 43, at 429.

handed like this, it is more likely than not that the abductor will prevail in retaining the abducted child long-term.

## V. COVID-19'S IMPACT ON HAGUE CONVENTION CASES

COVID-19 originated in China in 2019 but quickly spread around the globe, dramatically altering daily life everywhere.<sup>130</sup> The virus is highly contagious and spreads from person to person among those in close contact through respiratory droplets.<sup>131</sup> When an infected person coughs, sneezes, or talks, they release droplets which are in turn inhaled by people within about six feet, or two meters, of the contagious person.<sup>132</sup> Common symptoms include fever, cough, and tiredness, and the severity of symptoms range from mild to severe.<sup>133</sup> In the early days of the outbreak, several hotspots emerged, including Wuhan, China; Iran; northern Italy; Spain; and New York.<sup>134</sup> As the global outbreak unfolded, the geographical concentrations of COVID shifted. Even a year after the outbreak, the number of new cases was growing faster than ever.<sup>135</sup> By January 1, 2021, the virus had infected at least 84.2 million people, claiming 1.8 million lives worldwide.<sup>136</sup> Eleven months after the outbreak started, more than 500,000 new cases of COVID-19 were reported globally per day.<sup>137</sup> COVID-19 prompted worldwide school closures, workplace closures, and travel bans. This Section discusses how the global pandemic impacted Hague Convention litigation both logistically and substantively.

### A. Logistical Obstacles to the Administration of Proceedings

It goes without saying that the administration of international child abduction cases—like the administration of all judicial proceedings, particularly those with an international dimension—was complicated by the COVID-19 pandemic. When lockdowns began in March 2020, a member of the International Secretariat of the Association of Judges of Brazil began compiling information from colleagues in different countries to draft a global survey of measures taken

---

<sup>130</sup> *Covid World Map: Tracking the Global Outbreak*, N.Y. TIMES, <https://perma.cc/8RQD-53RL>.

<sup>131</sup> *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Nov. 6, 2020), <https://perma.cc/U5JH-BC7V>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Covid World Map*, *supra* note 130.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

to suspend judicial activity.<sup>138</sup> The informal report showed that, over the course of just ten days in March, the suspension of judicial activity spread at an unprecedented rate across the globe. On March 22, 2020, the member wrote:

The world faces an invisible army that carries death and disease wherever it goes. Scientists struggle against time in search of a vaccine against the virus or a cure for the disease. Governments adopt extreme contact restriction measures, with unpredictable economic consequences. . . . In this extreme scenario, the Judiciary in the world is forced to adapt. Presential activities are severely restricted in the most affected countries, but not only there. Remote work is widely adopted. Virtual audiences are encouraged.<sup>139</sup>

And yet, despite the challenges presented by COVID-19, the wheels of justice continued turning—“[t]he Judiciary adapts, but does not stop.”<sup>140</sup>

## B. Guidance from the HCCH

The year that the Hague Convention was signed, 1980, was a triumphant year for global health: it was the year that the World Health Organization (WHO) formally declared the global eradication of smallpox.<sup>141</sup> Smallpox had plagued humans for millennia and killed one third of infected patients.<sup>142</sup> The WHO’s formal declaration followed a nearly two-decade-long global vaccination campaign, which was seen as a culmination of advances in the science of vaccinations. “Polio vaccines, which were introduced in the 1950s and 1960s lead to similar success globally.”<sup>143</sup> In the decades leading up to the signing of the Hague Convention, several epidemics impacted the global community. The Asian Flu pandemic killed more than one million people worldwide between 1957 and 1958.<sup>144</sup> In 1961, “a cholera pandemic originating in Indonesia spread[ ] to other parts of Asia, the Middle East, and Africa.”<sup>145</sup> In 1968, the Hong Kong Flu pandemic killed an estimated one million people, about half of them residents of Hong Kong.<sup>146</sup> The Hague Convention was signed a year before the Centers for

---

<sup>138</sup> *Report on World’s Judicial Activity During the Coronavirus Pandemic*, INT’L ASS’N OF JUDGES (Mar. 26, 2020), <https://perma.cc/9EJT-3XXQ>.

<sup>139</sup> PAULO ROBERTO DORNELLES JUNIOR, INT’L ASS’N OF JUDGES, *REPORT ON WORLD’S JUDICIAL ACTIVITY DURING THE CORONAVIRUS PANDEMIC* 12–13 (2020), <https://perma.cc/Q443-EQZ7>.

<sup>140</sup> *Id.* at 13.

<sup>141</sup> *Timeline: Major Epidemics of the Modern Era 1899–2021*, COUNCIL ON FOREIGN REL. (Apr. 1, 2021) <http://perma.cc/KSL3-SXXF>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Disease Control and Prevention (CDC) first reported “a rare form of pneumonia later identified as Acquired Immunodeficiency Syndrome, or AIDS.”<sup>147</sup>

Although the signing of the Hague Convention coincided with a revolutionary achievement in the realm of global health—and although it can safely be assumed that most, if not all, of the drafters were savvy to the existence of recent outbreaks of smallpox, cholera, and Hong Kong Flu—there is no evidence that the drafters discussed the potential impact of infectious disease outbreaks on international child abduction cases.<sup>148</sup> The Hague Convention was intended to address a very specific type of cross-border, peacetime cooperation; it was not designed with a global health crisis or accompanying lockdowns and judicial suspensions in mind.

In July 2020, the HCCH released an emergency toolkit to help guide courts amidst the pandemic.<sup>149</sup> The toolkit advises that cases should be considered on an ad hoc basis and assures courts that “[t]he Convention continues to be effectively applied in times of COVID-19 through contact and cooperation with, and the sharing of resources between, Central Authorities.”<sup>150</sup> The toolkit encourages courts to “[f]ocus on the child” by “[s]ecuring the safe and prompt return of the child to the State of habitual residence” and “[e]nsuring continuing and suitable contact between [the left-behind] parent and child.”<sup>151</sup> The Permanent Bureau urges States Party to employ mediation, embrace technology, safeguard equality in access to the courts, and communicate “among members of the judiciary across borders through direct judicial communications or the International Hague Network of Judges.”<sup>152</sup> The toolkit acknowledges that “[t]he current restrictions on international travel pose challenges to the enforcement of return orders under the Convention.”<sup>153</sup>

In courts around the world, judges responded to the new practical obstacles facing Hague Convention proceedings. These proceedings are voluminous; in 2015, at least 2,997 children were involved in 2,270 return of child petitions.<sup>154</sup>

---

<sup>147</sup> *Id.*

<sup>148</sup> There is no evidence of any discussion of infectious disease in the Hague Convention’s explanatory documents. *See* The Pérez-Vera Report, *supra* note 43; ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION TOME III: ENLÈVEMENT D’ENFANTS (le Bureau Permanent de la Conférence ed., 1980) <https://perma.cc/XB6H-J7C7>.

<sup>149</sup> HAGUE CONF. ON PRIV. INT’L L., TOOLKIT FOR THE 1980 CHILD ABDUCTION CONVENTION IN TIMES OF COVID-19 (July 3, 2020), <https://perma.cc/3Z22-2XJJ>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> NIGEL LOWE & VICTORIA STEPHENS, HAGUE CONF. ON PRIV. INT’L L., PART I – A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2015 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980



Many judges held their Hague Convention proceedings remotely.<sup>155</sup> In Hague Convention cases where the left-behind parent prevailed, courts have been faced with the realities of enforcing return orders in the middle of a global pandemic. Citing the Convention's requirement that the return of the child be "prompt,"<sup>156</sup> many courts have chosen to enforce return orders without delay, despite the risks of travel.<sup>157</sup> Other courts have temporarily stayed the return of the child,<sup>158</sup> citing travel bans, the risks associated with travel during the pandemic, and the Convention's requirement that children's returns be "safe."<sup>159</sup>

### C. Article 13(b) Issues

As more Hague Convention cases grapple with infectious disease as the basis for Article 13(b) defenses, three major questions will likely emerge. First, does international travel generally—and air travel specifically—pose a "grave risk of harm" during an infectious disease outbreak? Since the start of the pandemic, the vast majority of governments have issued stay-at-home requirements or household lockdowns.<sup>160</sup> In January 2021, the majority of governments had either 1) an active stay-at-home order, recommending citizens refrain from leaving their homes or 2) an active stay-at-home order with exceptions for daily exercise, grocery shopping, and other essential errands.<sup>161</sup> Additionally, many countries had active travel bans.<sup>162</sup> Both of these types of government responses were designed

---

ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 3 (2018), <https://perma.cc/HA27-L9DV>.

<sup>155</sup> See, e.g., *KR v. HH*, [2020] EWHC (Fam) 834 (Eng.).

<sup>156</sup> The Hague Convention, *supra* note 14, art. 1.

<sup>157</sup> See, e.g., *Chambers v. Russell*, No. 1:20CV498, 2020 WL 5044036, at \*15 (M.D.N.C. Aug. 26, 2020) ("[T]he minor child, Z.R., shall be returned forthwith to the Country of Jamaica. Respondent shall arrange for Z.R. to be returned to Jamaica on or before September 4, 2020."); Thüringer Oberlandesgericht [OLGZ] [Higher Regional Court of Thuringia] Mar. 17, 2020, 1 UF 11/20 (Ger.) ("In its letter dated March 16, 2020, the Youth Welfare Office applied to have enforcement of the return order issued by Jena Local Court—Family Court—deferred for a limited period due to the current coronavirus pandemic. . . . The application made by the Youth Welfare Office is to be rejected.").

<sup>158</sup> See, e.g., *Gallegos v. Garcia Soto*, No. 1:20-CV-92-RP, 2020 WL 2086554, at \*8 (W.D. Tex. Apr. 30, 2020) ("However, IT IS FURTHER ORDERED that the effective date of this Order is stayed, indefinitely, until such time as the Court and the parties can be reasonably confident that the COVID-19 pandemic no longer renders international travel unsafe and widespread social distancing practices are no longer necessary . . . The Court will schedule status conferences as necessary to determine the precise date and the logistics of Y.E.G.'s return, involving the Mexican Consulate when appropriate and keeping in mind the need to ensure Y.E.G.'s return is both "prompt" and "safe.").

<sup>159</sup> The Hague Convention, *supra* note 14, art. 7.

<sup>160</sup> *Policy Responses to the Coronavirus Pandemic*, OUR WORLD IN DATA, <https://perma.cc/NQ8R-EDX9>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

to slow the spread of the virus. Most governments strongly discouraged international travel and air travel. In the case outlined in the Introduction, *KR v. HH*, the judge acknowledged that “international travel at this time potentially carries with it a higher prospect of infection than remaining in self-isolation.”<sup>163</sup>

Second, can one country’s infectious disease outbreak pose a “grave risk of harm” relative to another country’s outbreak? This line of inquiry acknowledges the ubiquity of the pandemic but also pits the infection rates of the child’s habitual residence against those in the State of refuge. It may also compare the prudence and efficacy of different government responses and public health policies or assert predictions about how a certain government’s responses and policies will impact future infection rates in that country. Judges typically appear reluctant to engage in this type of comparative analysis. The judge in *KR v. HH* refused to make a finding as to relative risk between England and Spain and simply concluded that there was “a genuine risk that PT could contract the virus whether she remains in England or returns to Spain.”<sup>164</sup>

Third, does a child—or do children in general—face a grave risk of *illness* after being infected by the infectious disease? Instead of evaluating the risk of exposure that a child’s return will entail and the likelihood that a child will contract the virus, this line of inquiry assesses the relative risk of the symptoms the child would experience should he or she contract the virus. Although many people only experience mild symptoms once they become infected with COVID, others face serious illness and complications like pneumonia, organ failure, blot clots, and/or death.<sup>165</sup> Data shows that older adults have a higher risk of serious illness and complications from COVID-19;<sup>166</sup> when compared to this vulnerable age group, children may not face a grave risk of illness. Similarly, if a child has an existing chronic medical condition known to put people at greater risk of becoming seriously ill with COVID-19, such as sickle cell disease, severe obesity, or serious heart disease, he or she may face a grave risk of illness.<sup>167</sup> In *KR v. HH*, the judge made a point of noting that neither PT nor her parents were elderly or had preexisting health concerns.<sup>168</sup> Ultimately, the judge incorporated this fact into his ultimate finding by reasoning that although “the travel associated with a return is likely to increase the risk that PT could contract coronavirus . . . I do not consider such a risk, when considered *in the context of the likely harm that would be suffered by PT*

---

<sup>163</sup> *KR v. HH* [2020] EWHC (Fam) 834, [47] (Eng.).

<sup>164</sup> *Id.*

<sup>165</sup> *Coronavirus disease 2019 (COVID-19)*, *supra* note 131. As noted *supra*, note 1, the COVID-19 pandemic is ongoing at the time of writing. There may be risks and side-effects that are presently unknown to the author.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *KR v. HH*, at [47].

*should she contract the virus*, is sufficient to amount to the ‘grave risk’ of physical harm required by Art[icle] 13(b).<sup>169</sup>

Recently, a number of these issues were raised in *The Father v. The Mother*,<sup>170</sup> a Hague Convention case in a family court in Tel Aviv. In that case, the mother (abductor) opposed her daughter’s return to the U.S. from Israel, arguing that “[t]here is a real health danger to the Minor, and each day worsens and increases the risk of damage should she fly. According to the experts, the epidemic in the United States is not under control at this point.”<sup>171</sup> The mother pointed to news articles to bolster her position, including one entitled “More than China: The United States is first in the number of corona patients.”<sup>172</sup> When asked to respond, the father wrote, “[t]he corona situation as you know is a problematic situation worldwide,” adding that “the situation in Israel is worse than the situation in California.”<sup>173</sup> Additionally, he argued that his daughter had health insurance in the U.S. but not in Israel—“If, God forbid, something happens to her, then [California] is the place where she should be.”<sup>174</sup> The father noted that “children are hardly at risk, the risk is marginal or non-existent.”<sup>175</sup>

The court concluded that the child would be safer in the U.S. “in light of the insurance coverage there” and held that because COVID-19 was not related to the child’s health condition, the mother had not demonstrated that the child would face a grave risk of harm.<sup>176</sup> In its opinion, the court highlighted the mother’s COVID-19 Article 13(b) defense, writing:

There is extreme importance that precisely in times of great uncertainty it is heard loud and clear that Minors’ rights are not an anarchy and the emergency situation cannot be exploited for change status de-facto [sic] disregarding the Minor’s right, her Father’s rights and ignore [sic] the provisions under International Conventions designed for ensuring minors’ rights and intended to settle complex legal and urgent situations between countries.<sup>177</sup>

The court also rejected the mother’s requests to delay the ruling in the case and prohibit the return of the child until the travel restrictions put in place by Israel’s Ministry of Health and the WHO had been lifted.<sup>178</sup>

---

<sup>169</sup> *Id.* (emphasis added).

<sup>170</sup> FamC (FC TA) 52595-02-20 *The Father v. The Mother* (Apr. 5, 2020) (Isr.), <https://perma.cc/E8NN-HEZS>.

<sup>171</sup> *Id.* at 56.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 58.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 59.

<sup>177</sup> *Id.* at 55.

<sup>178</sup> *Id.* at 54.

## VI. ANALOGIZING INFECTIOUS DISEASE TO EXISTING PRECEDENT

Surprisingly, legal scholars have never evaluated the propriety of an Article 13(b) defense predicated on the risks of an infectious disease, even though “disease” is one of the three zones enumerated by the *Friedrich* framework. Despite outbreaks of Ebola, cholera, SARS, and Zika over the last decade,<sup>179</sup> COVID-19-era litigation is the first to bring to light the potential applicability of the Article 13(b) exception to instances of infectious disease outbreaks. First, this Section will establish the dearth of “zone of disease” caselaw. Next, it will turn to the most robust category of “zone of” caselaw—“zone of war” cases—and reflect again on the narrow parameters of Article 13(b) and courts’ preferences for showings of particularized risk. Throughout this Section, the COVID-19 fact patterns serve as a touchstone to discuss the broader issue of Article 13(b) exceptions predicated on the risks of infectious diseases.

## A. The Illusive “Zone of Disease”

The “zone of disease” construction of the Article 13(b) defense is rarely raised by abductors and, when it is, it is typically raised halfheartedly and as part of a broader argument about conditions in the child’s habitual residence. In *Tavarez v. Jarrett*,<sup>180</sup> for example, the abductor argued that Mexico posed a grave risk of harm to the child “due to inadequate medical care, risk of disease, high rates of criminal activity, and abuse.”<sup>181</sup> The court found that there was no evidence offered to support the “zone of disease” defense other than the testimony of the abductor’s counsel that “there is no mosquito control [in Mexico].”<sup>182</sup>

Sometimes, courts characterize the defenses, that couch these weak “zone of disease” arguments, as poverty defenses. Typically, courts are unsympathetic to poverty defenses in the Hague Convention context, sensing the possibility of their abuse by abductors who are more affluent than their taking parent counterparts. For example, in *Cuellar v. Joyce*, the Ninth Circuit assessed a grave risk of harm defense brought by the father, claiming that the mother’s home in Panama lacked running water, air conditioning, or refrigeration and that the child was not given a proper diet, had reoccurring ear infections, and had unexplained burns behind her ears.<sup>183</sup> The father also asserted that the child had suffered a head trauma in an accident that could have been prevented had the mother been attentive.<sup>184</sup> The

<sup>179</sup> *Disease Outbreaks*, WORLD HEALTH ORG., <https://perma.cc/A7E7-2ZMZ>.

<sup>180</sup> *Tavarez v. Jarrett*, 252 F. Supp. 3d 629 (S.D. Tex. 2017).

<sup>181</sup> *Id.* at 638–39.

<sup>182</sup> *Id.* at 640.

<sup>183</sup> *Cuellar v. Joyce*, 596 F.3d 505, 509–10 (9th Cir. 2010).

<sup>184</sup> *Id.*

court noted that “[b]illions of people live in circumstances similar to those described . . . . If that amounted to a grave risk of harm, parents in more developed countries would have unchecked power to abduct children from countries with a lower standard of living.”<sup>185</sup> The Ninth Circuit held that the claims made by the father did not amount to a “grave risk of harm” and ordered the return of the child to Panama.<sup>186</sup>

Unlike the concerns raised by the father in *Cuellar*, the risks associated with the global pandemic have much less to do with the wealth of a country or the financial stability of the left-behind parent. While there is evidence that poverty may heighten the risk of infection and complications from COVID-19, the pandemic clearly affects populations across socioeconomic lines.<sup>187</sup> Thus, a court could not dismiss a COVID-19 “zone of disease” defense on the grounds that it constituted a poverty defense. However, it is possible that a future infectious disease outbreak could have a socioeconomic dimension that is not borne out by COVID-19. The Ninth Circuit’s statement that “[b]illions of people live in similar circumstances to those described” does apply to the current situation. Thus, the fact that the pandemic is ubiquitous may undermine its utility as the basis for an Article 13(b) defense. On the other hand, if a future infectious disease outbreak were less ubiquitous and more localized, this aspect of the inquiry might cut the other way.

In *C v. G*<sup>188</sup> the Republic of Ireland’s Court of Appeal tackled the “zone of disease” defense head on. The Court of Appeal overturned a High Court decision to refuse the return of a seven-year-old boy to Poland on the grounds that international travel during COVID-19 posed a grave risk to his physical safety.<sup>189</sup> The Court of Appeal held that the risks posed by COVID-19 were insufficient to establish an Article 13(b) defense alone.<sup>190</sup> The court noted that *Friedrich*’s “zone of disease” formulation would be rendered moot by this application, since every country in the world had been affected by the pandemic.<sup>191</sup> Allowing a “zone of disease” defense in this case would, “essentially, involve the suspension of the operation of the Convention.”<sup>192</sup> The court went on to note that the “zone of

---

<sup>185</sup> *Id.* at 509.

<sup>186</sup> *Id.* at 512.

<sup>187</sup> COLUM. UNIV. IRVING MED. CTR., *Crowded Homes, Poor Neighborhoods Linked to COVID-19*, SCIENCE DAILY (Jun. 18, 2020), <https://perma.cc/4CU4-PAXN> (“A study of nearly 400 pregnant women in New York City is among the first to show that lower neighborhood socioeconomic status and greater household crowding increase the risk of becoming infected with SARS-CoV-2, the virus that causes COVID-19.”).

<sup>188</sup> *C v. G* [2020] IECA 223 (Ir.), <https://perma.cc/529T-AFS2>.

<sup>189</sup> *Id.* at [149].

<sup>190</sup> *Id.* at [120].

<sup>191</sup> *Id.* at [84].

<sup>192</sup> *Id.*

disease” formulation should be understood in the context of its inclusion with “war” and “famine”—suggesting that the “zone of disease” formulation should be limited as well.<sup>193</sup> The application of the “zone of disease” defense in *C v. G* aligns with the trend in *Friedrich* caselaw towards narrow construction and with the general thrust of *Cuellar*.

The HCCH’s Guide to Good Practice acknowledges that health risks could constitute an Article 13(b) exception. First, the Guide advises that “[i]n cases involving assertions associated with the child’s health, the grave risk analysis should focus on the availability of treatment in the State of habitual residence, and not on a comparison between the relative quality of care in each State.”<sup>194</sup> In analogizing to the infectious disease outbreak fact pattern, this guidance suggests that, provided there are adequate government public health precautions and medical facilities available in the child’s country of habitual residence, courts should resist comparing the healthcare systems of the two countries. The Guide’s resistance to comparison may also suggest, more broadly, that courts should avoid comparing the relative risk of infection in the two countries. Second, the Guide advises that “[a] grave risk will typically be established only in situations where a treatment is or would be needed urgently and it is not available or accessible in the State of habitual residence, or where the child’s health does not allow for travel back to this State at all.”<sup>195</sup>

In *State Central Authority v. Maynard*, the Family Court of Australia held that return to England would expose a child to an Article 13(b) grave risk where extensive medical records demonstrated that the child’s epileptic seizures meant that “travel could result in significant and serious damage to [the child] or her death.”<sup>196</sup> On the other hand, the court rejected the abductor’s arguments comparing the English medical system to the Australian medical system.<sup>197</sup>

Here, there is a clear parallel to the risk of international travel presented by an infectious disease outbreak and the arguments echo those raised by the abductor in *The Father v. The Mother*. However, in *State Central Authority*, the child had a specific, demonstrable, pre-existing medical condition that created a particularized serious health risk incident to travel. This distinction suggests that while the Guide and cases like *State Central Authority* may encourage courts to consider the risks of travel in terms of how an infectious disease may interact with a child’s pre-existing medical condition, these authorities would not necessarily extend that consideration to every child during an infectious disease outbreak. It

---

<sup>193</sup> *Id.*

<sup>194</sup> HCCH, ARTICLE 13(B) GUIDE, *supra* note 113, at 27.

<sup>195</sup> *Id.*

<sup>196</sup> *State Central Authority v Maynard* (Unreported, Family Court of Australia at Melbourne, Kay J, 9 March 2003) [27] (Austl.).

<sup>197</sup> *Id.* at [30].

is likely that the generalized health risks associated with international travel during COVID-19 do not fall within the purview of this guidance.

## B. Zone of War

Although, the zone of war caselaw is more fleshed out than other aspects of the *Friedrich* framework, the existing precedent mostly serves to confirm and reinforce the limitations of the Article 13(b) “zone of” exceptions. Commensurate with other areas of *Friedrich* caselaw, the zone of war formulation is construed “extremely narrow[ly]” by courts and rarely, if ever, succeeds.<sup>198</sup> In *Silverman v. Silverman*, for example, the Eighth Circuit held that Israel did not constitute a zone of war, despite intense regional violence, including suicide bombings.<sup>199</sup> As previously mentioned in Section III, the U.S. is not alone—courts in Argentina, Australia, Belgium, Canada, Denmark, the U.K., France, and Germany have all found that the conditions in Israel did not constitute a grave risk of harm within the meaning of Article 13(b).<sup>200</sup> In reaching its decision the Eighth Circuit reasoned that the situation “threaten[ed] everyone in Israel,” bolstering the idea that a generalized risk may be insufficient to show a grave risk.<sup>201</sup> This reasoning is awkward because, almost by definition, a zone of war creates a dangerous situation for the general public. If general regional violence that “threaten[s] everyone” is insufficient to demonstrate a grave risk of harm under *Friedrich*, is the zone of war framework obsolete? Likely, under *Silverman*’s logic, the risk of an infectious disease outbreak does not rise to the level of grave risk imagined by Article 13(b). Indisputably, the pandemic “threaten[s] everyone.” This generalization is even more true in the COVID-19 context because the threat of the pandemic cannot be conceptually severed from its global nature—whereas the violence in *Silverman* only extended to the broader Middle East/North Africa region. And, crucially, the risks are equally extreme: death is the worst-case scenario of living in a war zone or being infected by a disease.

The *Silverman* opinion points to a district court case with more concrete zone of war criteria.<sup>202</sup> *Freier v. Freier* evaluates another a grave risk of harm defense predicated on the 1996 violence in Israel, finding it similarly insufficient to the defense raised in *Silverman*.<sup>203</sup> But unlike the Eighth Circuit in *Silverman*, in reaching its decision in *Freier*, the district court provided specific reasoning. The court held

---

<sup>198</sup> Cleary, *supra* note 103, at 2645.

<sup>199</sup> *Silverman v. Silverman*, 338 F.3d 886, 901 (8th Cir. 2003).

<sup>200</sup> See McEleavy, *Habitual Residence Case Law Analysis*, *supra* note 107.

<sup>201</sup> *Silverman*, 338 F.3d at 901.

<sup>202</sup> *Id.* at 900–01.

<sup>203</sup> *Freier v. Freier*, 969 F. Supp. 436, 443 (E.D. Mich. 1996), (“The Court would agree that at this time Israel is experiencing some unrest and that this unrest may be in relative proximity to the family’s residence. However, the Court does not find sufficient evidence in this record for Israel to be the ‘zone of war’ contemplated by the Sixth Circuit or the Hague Convention.”).

that Israel did not qualify as a zone of war because schools and businesses were open and the petitioner was able to leave the country.<sup>204</sup> Additionally, the court noted that “the fighting is limited to certain areas and does not directly involve the city where the child resides.”<sup>205</sup>

Analogizing from this logic, COVID-19 would most likely have constituted a grave risk of harm in some countries at certain points during the course of the pandemic. First, school closures were widespread due to the pandemic. According to UNESCO, on April 2, 2020, 84.5% of total learners enrolled at pre-primary, primary, lower-secondary, upper-secondary, and tertiary education levels were impacted by COVID-19 school closures worldwide.<sup>206</sup> Almost 1.5 billion learners were affected, and 172 countries had implemented nationwide school closures.<sup>207</sup> By September 2020, those numbers had fallen, but 49.6% of total learners were still impacted by closures worldwide.<sup>208</sup> More than 850 million children were still affected, and there were 50 country-wide school closures still in effect.<sup>209</sup>

Second, many countries had workplace closures as a result of the pandemic. In some countries, including China, Brazil, Chile, and Indonesia, workplace closures were still in effect in September 2020 for all but essential workplaces such as grocery stores and medical facilities.<sup>210</sup> By contrast, in countries like Canada, Mexico, India, and Russia workplace closures were only in effect for select sectors or categories of workers as of fall 2020.<sup>211</sup> Globally, workplace closures shifted with the tides of infection rates and public policy calculations as the markets reacted to the cost of forced closures and laborers reevaluated health risks against growing financial pressure to return to work.

Third, many countries put in place travel bans to stem the flow of the pandemic. For example, in April 2020, more than 7.1 billion people worldwide lived in countries with travel bans.<sup>212</sup> “Roughly 3 billion people . . . live[ed] in countries with borders completely closed to noncitizens and nonresidents.”<sup>213</sup> On March 28, China closed its borders to foreigners with the exception of “some diplomatic and scientific personnel.”<sup>214</sup> At the start of the pandemic India “closed

---

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *COVID-19—Education: From Disruption to Recovery*, UNESCO, <https://perma.cc/7QJP-QPMC>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Policy Responses to the Coronavirus Pandemic*, *supra* note 160.

<sup>211</sup> *Id.*

<sup>212</sup> Phillip Connor, *More Than Nine-in-ten People Worldwide Live in Countries with Travel Restrictions Amid COVID-19*, PEW RES. CTR. (Apr. 1, 2020), <https://perma.cc/68SP-2DVY>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*



its borders by suspending visas and requiring a two-week quarantine for all arrivals regardless of citizenship.”<sup>215</sup> Since the beginning of the outbreak, governments slowly lifted or amended travel bans, but many countries continued to enforce travel restrictions in some form or another, especially for noncitizens.<sup>216</sup> In September 2020, 70 countries were completely closed and 55 countries had no travel restrictions.<sup>217</sup>

Thus, according to the three metrics posited by *Freier*, COVID-19 may have presented a grave risk of harm to some children in certain countries at certain times during the pandemic. However, the analysis above highlights the fickle nature of *Freier*’s standards in this context, as the impacts of infectious diseases are constantly in flux. The *Freier* framework may be administrable in the context of a protracted war, but in terms of an infectious disease outbreak, where the landscape of risk and government responses change daily, these metrics would likely prove unmanageable. Additionally, *Freier*’s reasoning has a very limited sphere of influence. Not only does it lack appellate authority, the opinion also employs this criterion to reach an unfavorable decision for the abductor on the Article 13(b) defense. The likelihood that *Freier* could be used to successfully argue an Article 13(b) defense predicated on the risks posed by the pandemic or another infectious disease outbreak is slim. This likelihood is weakened by a stark fact raised in *Silverman*: “there does not appear to be [any] case that finds any country a ‘zone of war’ under the Convention.”<sup>218</sup>

## VII. SUGGESTIONS

This Comment recommends that, generally, courts should reject Article 13(b) defenses predicated on infectious disease outbreaks like COVID-19. Instead, courts should adopt a rebuttable presumption that the risk of exposure to an infectious disease does not constitute a grave risk of harm to the child within the meaning of the Hague Convention. If States Party decline to adopt such a rebuttable presumption, they should, at the very least, provide left-behind parents with an equitable relief doctrine in cases where the abductor has already put the child at risk of infection.

### A. The Rebuttable Presumption

This Comment advocates for a rebuttable presumption against “zone of disease” defenses. Under this rule, the abductor would be able to rebut the presumption against the “zone of disease” defense by demonstrating that the child

---

<sup>215</sup> *Id.*

<sup>216</sup> *Travel Restrictions by Country*, KAYAK, <https://perma.cc/NXS2-YC28>.

<sup>217</sup> *Id.*

<sup>218</sup> *Silverman v. Silverman*, 338 F.3d 886, 901 (8th Cir. 2003).

faces a particularized risk of serious complications incident to infection. As demonstrated in Sections III and VI, States Party have generally understood the Article 13(b) exception to be applicable in situations of particularized, rather than generalized, risk. A particularized risk of serious complications would require a showing that the child is more at risk of serious complications like serious injury or death than the general population. Evidence such as the extensive medical records presented by the abductor in *State Central Authority*<sup>219</sup> demonstrating her child's epileptic seizure condition, would be persuasive. Courts should weigh heavily medical records and reports from credible health institutions (such as the WHO or the CDC) showing that the child is part of a particularly vulnerable population. Testimony from the child's medical provider would also be cogent. In rare cases, a showing of generalized risk may be sufficient if the abductor could show that the child still faced a substantial risk of serious injury or death even absent a particular vulnerability. For example, such an exception would have applied to a disease like smallpox, which had a mortality rate of over thirty percent.<sup>220</sup>

In situations where a particularized risk is found, the court should hold that the child faces a "grave risk of harm" within the meaning of the Hague Convention. However, if there are reasonable voluntary undertakings the court could impose to neutralize the particularized risk, the court should exercise its discretion to return the child despite the finding that the abductor had met his or her burden under the Article 13(b) exception. Courts should elicit voluntary undertakings from left-behind parents to place customized safety precautions on return orders. These voluntary undertakings could include promises to help the child practice social distancing, mask-wearing, and quarantine and promises to comply with certain travel recommendations, including recommendations regarding the timing of travel plans and modes of transportation. Similarly, the court should consider issuing a return order, but staying the order until the particularized threat to the child is neutralized.

In cases where no particularized risk to the child is found and the taking parent has failed to meet his or her Article 13(b) burden, the judge must return the child to his or her habitual residence. However, even absent a showing of particularized harm, the court should take precautions to protect the safety of the child. If the infectious disease poses a serious public health risk, the court should adopt reasonable protective measures and consider temporarily staying the order for the child's return.

A rebuttable presumption against the "zone of disease" defense is an appropriate solution to the risks posed by infectious diseases for several reasons.

---

<sup>219</sup> *State Central Authority v Maynard* (Unreported, Family Court of Australia at Melbourne, Kay J, 9 March 2003) (Austl.).

<sup>220</sup> *Timeline: Major Epidemics of the Modern Era 1899–2021*, *supra* note 141.

First, as discussed in Section IV, while an infectious disease outbreak is, by definition, a temporary occurrence, the consequences of a court finding a grave risk to the child can effectively finalize the child's custody arrangement by making it nearly impossible for a left-behind parent to retrieve their child if they are unsuccessful in appealing the trial court's judgment. If the court finds a grave risk of harm to the child, the judge must deny the Hague petition and refuse the return of the child unless the judge decides to exercise his or her discretion to grant the return of the child notwithstanding the established grave risk. While this judicial discretion exists in theory, some judges feel that such measures are only justified in "highly unusual or exceptional circumstances" and remark that "it is difficult to conceive of such situations."<sup>221</sup> Instead of relying on judges to exercise their discretion when erroneous "zone of disease" defenses are successfully raised, States Party should build the preferred outcome into their reading of the law itself by creating a rebuttable presumption against such defenses.

Moreover, the Convention drafters intended that the exceptions to return to be narrowly drawn, and thus a rebuttable presumption effectuates the original understanding of the grave risk of harm defense. As discussed in Sections II(A) and IV, the purpose of the Convention is to neutralize the artificial legal and logistical advantages enjoyed by the taking parent as a result of international child abduction. The drafters feared that "a systemic invocation of the [Convention's] exceptions, substituting the forum chosen by the abductors for that of the child's [habitual] residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration."<sup>222</sup> A rebuttable presumption bolsters a narrow construction of this defense, avoiding a "systemic invocation" of the Article 13(b) exception, while providing for the safety of the child via protective measures and stays.

Finally, a rebuttable presumption against "zone of disease" defenses upholds the foundational principle of the Convention. "[T]he Convention as a whole," wrote Pérez-Vera, "rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition."<sup>223</sup> A rebuttable presumption ensures that all children who can be safely returned to their habitual residence are returned as soon as possible. A child victim of international child abduction "suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teaches and

---

<sup>221</sup> D. v. G. [2001] 1179 H.K.C. 1, 5 (C.F.A.) (H.K.), <https://perma.cc/QSH8-DPB2>.

<sup>222</sup> The Pérez-Vera Report, *supra* note 43, at 435.

<sup>223</sup> *Id.* at 434.

relatives.”<sup>224</sup> In addition to these uncomfortable and frightening experiences of destabilization, children may face long-term mental health struggles as a result of their abduction. Studies have shown that “[c]hildren who have been psychologically violated and maltreated through the act of abduction, are more likely to exhibit a variety of psychological and social handicaps.”<sup>225</sup> Abducted children suffer from depression, excessive fearfulness, helplessness, anger, disruption in identity formation, and fear of abandonment—conditions which may persist lifelong.<sup>226</sup> Overall, a rebuttable presumption against “zone of disease” defenses increases the likelihood that a child will be returned to his or her habitual residence and lessens the length of time a child spends away from home as a victim of international child abduction.

## B. The Unclean Hands Doctrine

Lastly, if States Party decline to adopt such a rebuttable presumption, they should, at the very least, provide left-behind parents with an equitable relief doctrine in cases where the abductor has already put the child at risk of infection. If an abductor has abducted a child during an infectious disease outbreak and is now insisting that the child cannot be returned because of that outbreak, the abductor has “unclean hands.”

Traditionally, the doctrine of unclean hands is understood for the equitable maxim that “he who comes into equity must come with clean hands.”<sup>227</sup> It is a “self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the mater in which he seeks relief, however improper may have been the behavior of the defendant.”<sup>228</sup> Historically, U.S. courts have declined to apply the doctrine in Hague Convention cases. In *Karpenko v. Leendertz*, for example, the Third Circuit held that the mother’s interference with the father’s custody rights did not bar return after the father’s wrongful removal of the child and concluded that the “application of the unclean hands doctrine would undermine the Hague Convention’s goal of protecting the well-being of the child.”<sup>229</sup> However, this rejection of the unclean hands doctrine should be reconsidered in light of the peculiar fact dynamics at play in a “zone of disease” defense.

---

<sup>224</sup> *Id.* at 432 (quoting M. Adair Dyer, *Questionnaire and Report on International Child abduction by One Parent*, Preliminary Doc. No. 1 (Aug. 1978)).

<sup>225</sup> Nancy Faulkner, Report Presented to U.N. Convention on Child Rights in Special Session, *Parental Child Abduction is Child Abuse* (June 9, 1999), <https://perma.cc/XQ83-CX2U>.

<sup>226</sup> *Id.*

<sup>227</sup> *Karpenko v. Leendertz*, 619 F.3d 259, 265 (3d Cir. 2010).

<sup>228</sup> *Id.* (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)).

<sup>229</sup> *Id.* at 265.

In the context of the “zone of disease” defense, the unclean hands doctrine would preclude the use of the Article 13(b) exception by abductors who had already exposed their children to the infectious disease at issue. A family court in London recently heard a case in which such a doctrine could be applied. In *Re N (a child)*,<sup>230</sup> the mother took her child to the Greek island of Paros on March 20, 2020, three days before the Prime Minister announced a national lockdown in the U.K.<sup>231</sup> The mother claimed that her intention in traveling to Paros was to escape the dangers of the pandemic:

[T]he main reason that I have come to Greece is that I am very afraid of the coronavirus and I want to do whatever I can to keep N (and me) safe from it. The small Greek island where my mother lives, where N and I are now staying with her, is naturally isolated from the mainland and has its own medical facilities. It is absolutely safe for until now there were zero (0) incidents of corona virus contamination. I believe that it is a much safer place to be for us than the much more densely populated area of Barking / outskirts of London.<sup>232</sup>

The court held that while the mother may be correct that the COVID-19 infection rate was lower in Greece at the time, “that does not justify, in the slightest, what was a wrongful removal of N from the place of his habitual residence.”<sup>233</sup> Ultimately the court did not reach the merits of the petition,<sup>234</sup> but the facts of *Re N (a child)* nevertheless raise a thought-provoking hypothetical: what if the abductor in *Re N (a child)* had levied a “zone of disease” defense to the child’s return to Barking?

Common sense dictates that an abductor who traveled with her child during the pandemic—albeit early in the outbreak (March 20)—should be precluded from arguing that her child would face a “grave risk of harm” were the child ordered to return to the U.K. Essentially, the abductor has already exposed the child to the same “grave risk.” Recently, a U.S. district court agreed, quickly disposing of the abductor’s Article 13(b) defense. Without specifically naming the unclean hands doctrine, the judge reasoned with similar logic:

Finally, Respondent argues that the risk from COVID-19 is so great that he should not be required to return Z.R. to Jamaica. The court does not find this testimony persuasive. Respondent testified that he recently brought his six-year-old daughter from Jamaica to stay with him in the U.S.; he will be taking her back later this month.<sup>235</sup>

---

<sup>230</sup> *Re N (a child)* [2020] EWFC (Fam) 35, [16] (Eng.).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at [25].

<sup>233</sup> *Id.* at [16].

<sup>234</sup> *Id.* at [26]–[27].

<sup>235</sup> *Chambers v. Russell*, No. 1:20CV498, 2020 WL 5044036, at \*14 (M.D.N.C. Aug. 26, 2020).

An equitable relief doctrine akin to the unclean hands doctrine would provide left-behind parents a necessary safety net in jurisdictions that decline to adopt a rebuttable presumption against “zone of disease” defenses.

### VIII. CONCLUSION

The COVID-19 pandemic has exposed troubling gaps in Article 13(b) caselaw and guidelines. During the global health crisis, abductors have carved out a new iteration of the grave risk of harm defense predicated on the risks posed by an infectious disease outbreak. It is essential that States Party put forward a united response to this “zone of disease” defense. A rebuttable presumption against the “zone of disease” defense would correctly balance the Hague Convention’s goal of restoring the legal status quo between parties while preserving the important “safety valve” function Article 13(b) is meant to provide. Doubtless, these cases present courts with an unenviable task. Future scholarship may speculate on the ethical pitfalls of entrusting judges with risk assessments that necessarily draw on an emerging and ever-evolving body of public health news and medical research. In the meantime, courts should continue to combat the scourge of international child abduction by securing the prompt and safe return of abducted children, reminding abductors “that Minors’ rights are not an anarchy and the emergency situation cannot be exploited.”<sup>236</sup>

---

<sup>236</sup> FamC (DC TA) 52595-02-20 *The Father v. The Mother*, 16 (Apr. 5, 2020) (Isr.), <https://perma.cc/E8NN-HEZS>.